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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No. **1359** **118**

JAMES PICARELLI,
Petitioner,

vs.

UNITED STATES OF AMERICA.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

ABRAHAM SOLOMON,
Counsel for Petitioner.



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*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

JAMES PICARELLI, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on the 12th day of May, 1945.

Opinion Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit (SWAN, A. N. HAND and CLARK, Circuit Judges) is annexed to the original certified transcript of record.

Jurisdiction

The order for mandate of the United States Circuit Court for the Second Circuit was entered on May 12, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also rules XI and XIII of the Rules of Practice and Procedure after Plea of Guilty, Verdict or Finding of Guilt in criminal cases, promulgated by this Court May 7, 1934.

Questions Presented

1. Did the Circuit Court err in refusing to reverse the judgment of conviction herein.
2. Did the Trial Judge err in denying petitioner's motion to dismiss the information at the end of the Government's case.
3. Did the Trial Judge err in denying petitioner's motion to dismiss the information at the end of the entire case.

The Statute and Regulations Involved

The statute involved is Title 50, Appendix, Section 633, United States Code, which vests in the President the power to regulate materials essential for national defense. Pursuant to an Executive Order, the authority pertaining to the rationing of gasoline was delegated to the Office of Price Administration and Ration Order No. 5A was duly promulgated by the Price Administrator.

The Information

The Information contains one count which charges that James Picarelli and Thomas J. Ward, the defendants

herein, unlawfully, wilfully and knowingly did have in their possession approximately 8,271 A-9, A-10, A-11, and A-12 gasoline ration coupons, the said defendants being then and there not the person or agent of the person to whom said coupons were issued, or by whom they were acquired in accordance with Ration Order No. 5A duly issued by the Price Administration * * *.

The Facts

The defendants, Ward and Picarelli, were by their own statements, bookmakers. They were not the person or persons or the agent or agents of the person or persons entitled to possession of the gasoline coupons at issue on the trial. Defendants stipulated this fact (fols. 26 to 32). On the 3th day of November, 1943, they were in a car in the vicinity of 20 Cherry Street, in the City and County of New York, where they were observed by John F. Trihy, a member of the New York City Police Department (fols. 34, 35). Picarelli was seen to leave the car, go to an empty lot, pick up some empty whiskey bottles and return with them to the car. Ward was observed sitting in the back, looking at some papers. Trihy entered the car and asked Ward what his occupation was. Ward stated that he was a bookmaker. Trihy then took a paper bag and cards from Ward's lap (fol. 35), looked in the bag and discovered therein a quantity of "A" gasoline ration coupons. Trihy examined the cards and found them to be small index type cards containing names and addresses and in many instances a crayoned notation reading "A." Trihy then ordered Picarelli to drive to the Third Precinct Station House on Oak Street (fol. 62). While the car was en route to the station house, Picarelli stopped the car and said, "Listen Officer, can't we talk this thing over" (fol. 63).

At the station house Trihy was joined by Andrew F. Kaye, a Special Investigator of the OPA, who questioned the defendants. Ward admitted having the bag in his lap (fol. 132) but disclaimed ownership thereof (fol. 133) and disclaimed knowledge of the contents (fol. 155).

Picarelli denied possessing the stamps (fol. 122). Agent Kaye testified that Picarelli told him that the car had been repurchased by him a day or two before from one, Frank Greco (fol. 120). Agent Kaye called Greco to the station house. Greco, in the presence of Picarelli, said that he had left no stamps in the car and that he did not have any stamps (fols. 120, 122).

Defendant Ward testified at the trial that he never had the bag in his lap, but that he had noticed it hidden between the cushions in the rear of the car and did not know what it contained. In this respect his testimony was in conflict with that of Officer Trihy who said Ward had the bag in his lap, and also conflicted with Ward's admission to Agent Kaye that he had the bag in his lap (fols. 132, 134). Ward further stated that he never before saw either the cards or the coupons and that he had only touched the cards and never touched the coupons.

No evidence of bookmaking or its necessary paraphernalia was found on the defendants (fol. 228).

Picarelli did not take the stand or offer any witnesses (fol. 222).

Specification of Errors to Be Urged

The Court below erred as follows:

1. In sustaining the judgment of conviction.
2. In failing to reverse the judgment of conviction for failure of the District Court to grant the motion for directed verdict on grounds of insufficient evidence.

3. In failing to reverse the judgment of the District Court for its error in overruling petitioner's motion in arrest of judgment.

Reasons for Granting the Writ

1. Did the Circuit Court err in refusing to reverse the judgment of conviction herein?

2. Did the Trial Judge err in denying petitioner's motion to dismiss the information at the end of the Government's case?

3. Did the Trial Judge err in denying petitioner's motion to dismiss the information at the end of the entire case?

A

It is a fundamental proposition of law that on a motion for a directed verdict, the evidence must be considered in its most favorable aspect to the appellee.

United States v. Scarborough (C. C. A.), 57 F. (2d) 137;

Knable v. United States (C. C. A.), 9 F. (2d) 567;

Burton v. United States, 202 U. S. 344;

Kelly v. United States (C. C. A.), 258 F. 392.

If there is substantial evidence, it must be submitted to the jury, whose function it is to consider and weigh it, and this includes credibility of witnesses.

Montana Tonopah Mining Co. v. Dunlap (C. C. A.), 196 F. 612;

United States v. Burke (C. C. A.), 50 F. (2d) 653;

United States v. Lesher (C. C. A.), 59 F. (2d) 53;

Toledo, St. L. & W. R. Co. v. Howe (C. C. A.), 191 F. 776;
Woodward v. Atlantic Coast Line R. R. (C. C. A.), 57 F. (2d) 1019;
Engstrom v. De Witt (C. C. A.), 58 F. (2d) 137.

The record in the instant case clearly shows that there is no substantial evidence to sustain the charge against the petitioner, Picarelli, to wit: that he did unlawfully, wilfully and knowingly have in his possession gasoline ration coupons in violation of ration order 5A, duly issued by the Price Administrator. (Italics mine.)

The following colloquy occurred as to the admission of the cards as an exhibit:

“Mr. McLaughlin: If your Honor please, I think at this time this batch of cards has been sufficiently identified.

The Court: Any objection to the particular ones identified by the witness?

Mr. Solomon: The defendant Picarelli objects to the introduction of the cards in evidence so far as he is concerned, on the ground that the testimony shows that they were found in the possession of the co-defendant Ward, and have no connection with my client, and there is no evidence to show that he had any knowledge or possession or knew of the existence of these cards. I ask your Honor to exclude them insofar as they are related to the defendant Picarelli.

The Court: I think at this time the Court would agree with you. There isn't any connection with the defendant Picarelli through this witness. At this particular time the motion to admit the cards will be sustained and the jury will be instructed to disregard the cards so far as the defendant Picarelli is concerned” (fols. 47-48).

The following colloquy occurred as to the admission of the brown paper bag and its contents, which are strips of stamps:

"Mr. McLaughlin: If your Honor please, at this time I offer this brown paper bag and its contents, which are strips of stamps.

The Court: Any objection?

Mr. Solomon: I object to the introduction—

The Court: The same objection will be sustained. It is not binding on your defendant at this time. It may be reoffered later but at this time it is not admissible against the defendant Picarelli.

Mr. Broderick: No objection on behalf of the defendant Ward.

The Court: It may be admitted.

(Marked Government's Exhibit 2)" (fol. 60).

The following colloquy occurred as to the admission of other cards found in the possession of the defendant Ward:

"Mr. McLaughlin: I now offer these in evidence, your Honor.

The Court: Any objection?

Mr. Solomon: So far as the defendant Picarelli is concerned, I raise the same objection. Are these different cards?

Mr. McLaughlin: No, the same cards. It is a portion of them.

The Court: A portion was admitted this morning.

Mr. Solomon: I object to them as to my client on the same grounds as to the others. There is no proof that my client had them in his possession or under his control.

The Court: Are you offering them against one defendant or both?

Mr. McLaughlin: I am offering them as I offered them originally, as against Ward. I don't wish to be bound—

The Court: Any objection on the part of Ward?

Mr. Broderick: No.

The Court: They may be admitted as against Ward. They are only offered for that purpose.

Mr. McLaughlin: I am offering them for the purposes of the entire case but I understand your Honor will only take them at this time as to Ward and subject to connection as to Picarelli.

The Court: I refused them this morning as to Picarelli.

Mr. McLaughlin: That is right. No further questions.

(Marked Government's Exhibit 3)" (fols. 147-148).

In *Union Pacific Coal Co. v. U. S.*, 173 F. at page 740, Circuit Judge SANBORN, speaking for the Court, said:

"There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction. *Vernon v. United States*, 146 Fed. 121, 123, 124; *United States v. Richards* (D. C.), 149 Fed. 443, 454; *Hayes v. United States* (C. C. A.), 169 Fed. 101, 103; *United States v. Hart* (D. C.), 78 Fed. 868, 873, affirmed in *Hart v. United States*, 84 Fed. 799."

To the same effect, see:

Hart v. U. S., 84 Fed. 799-808;

Wright v. U. S., 227 Fed. 857;

Wiener v. U. S., 282 Fed. 799-801;

Yusem v. U. S., 8 Fed. Report (2), page 8.

In said case, the Court held as follows:

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate

court to reverse a judgment of conviction. *Hart v. United States*, 84 F. 799-808; *Union Pacific Coal Co. v. United States*, 173 F. 737, 740; *Wright v. United States*, 227 F. 855, 857; *Joseph Wiener et al. v. United States (C. C. A.)*, 282 F. 799-801. The evidence was not sufficient to sustain the verdict, and the jury should have been instructed to return a verdict for the defendant on the motion of his counsel at the conclusion of the government's case."

The evidence here shows affirmatively that the stamps were never in the possession of the petitioner, Picarelli; or that he knew of their being in the possession of the co-defendant, Ward. They were excluded as exhibits as to the petitioner, Picarelli.

The Court excluded Government's Exhibits 1, 2 and 3 when they were offered against the petitioner, Picarelli, because there wasn't any connection with him.

It is, therefore, clear from the rulings of the Court that there was no evidence to connect the charge set forth in the information with the petitioner, Picarelli; therefore, the Government lacked any proof of an unlawful, wilful and knowing possession by the petitioner, Picarelli, of the gasoline ration stamps referred to in the information. This being so, there was a failure of any proof connecting the petitioner, Picarelli, with the offense charged. *There was no substantial evidence against the petitioner, Picarelli. For the lack of such substantial evidence there was nothing for the jury to weigh. Therefore, the case should not have been sent to the jury, and the motion for a directed verdict as to the petitioner, Picarelli, should have been granted.*

B

The Court in a *Per Curiam* opinion held as follows:

"* * * As to Picarelli the case was somewhat less strong but was still sufficient to submit to the jury. Picarelli owned the parked automobile. The

officers saw him leave the driver's seat, walk to a vacant lot, pick up some empty bottles and bring them back to the car. At this moment the policemen intervened. Picarelli stated to the arresting officer that he did not know where the coupons came from and that Ward said he found them in the car. On the way to the police station, Picarelli pulled his car to the curb and said to the policeman: 'Listen, officer, can't we talk this thing over?' No innocent explanation of this inquiry being vouchsafed, we think the effort to effect a settlement may be regarded as evidencing consciousness of guilt. *Christian v. U. S.*, 8 F. 2d, 732, 733 (C. C. A. 3); 4 Wigmore, evidence, 3rd ed., p. 31. This, coupled with ownership of the car, justified sending the case to the jury * * *."

Apparently, the Circuit Court of Appeals affirmed the conviction on the above statement of consciousness of guilt. The evidence adduced at the trial dealt exclusively with statements made by the defendant or his co-defendant that they were engaged in bookmaking. Therefore, the Circuit Court should have inferred that the petitioner, Picarelli, when talking to the police officer, was under the impression that an arrest was being made for violation of a bookmaking statute and the theory of consciousness of guilt should have applied only to the discussion of bookmaking and not to the charge for which the petitioner was placed on trial.

CONCLUSION

The questions submitted, coupled with the acknowledgment of the Circuit Court that the case was somewhat less strong as against the petitioner, is in the opinion of your deponent sufficient for this Court to grant the petition for a writ of certiorari. The writ should be granted.

Respectfully submitted,

ABRAHAM SOLOMON,
Counsel for Petitioner.

